80-384

Supreme Court, U.S.
FILED
AUG 16 1980
MICHAEL RODAK, JR., CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

v.

SAMUEL UNGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

HERBERT G. HAWKINS
Counsel for Petitioner

30 North San Pedro Road
San Rafael, California 94903
(415) 479-3663

QUESTIONS PRESENTED

In the action below SAMUEL UNGER brought suit seeking to prevent MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE from participating in a "non-partisan" school board election. Despite petitioner's objection, at every stage of the proceedings, that such relief would violate its rights of free speech and association guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, the California Court of Appeal held that the Central Committee in particular, and California political parties in general, were prohibited by Article II, Section 6 of the California Constitution from endorsing, supporting or opposing candidates in any election for a "nonpartisan" office.

The question is thus presented:

Can a State Constitution providing for "nonpartisan" offices foreclose the exercise of petitioner's basic constitutional rights of free speech, assembly and political association? Or stated somewhat more generally, in the light of the First Amendment can partisan political activity be prohibited in local elections defined as nonpartisan?

Note: Parties to Action Below

In the action below, the parties were Samuel Unger, petitioner, Marin County Democratic Central Committee, originally respondent and later called real party in interest, and Marin County Superior Court, added as an additional respondent.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	4
Statement	5
Facts	6
Reasons for Allowing the Writ	11
Conclusion	20
Appendix 1, Decision, California Court of Appeal	22
Appendix 2, Modification of Decision	39
Appendix 3, Order of California Supreme Court Denying Hearing	43

CITATIONS

California Constitution Article II, Section 6	4, 5, 21

Cases:

(See next page)

TABLE OF CASES

	Page(s)
Abington School Dist. v. Schempp (1953) 374 U.S. 203, 83 S.Ct. 1560 .	12
Abrams v. Reno (1978) U.S.D.C., Florida 452 F. Supp. 1166	18, 19
Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412. .	13
Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339	15
Buckley v. Valleo, 424 U.S. 1, 96 S.Ct. 612	13, 16, 17
Cal. Democratic Council v. Arneberg (1965) 233 Cal. App2d 425	9, 10
Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, ...	12, 19
Cohen v. State of California, 403 U.S.15, 91 S.Ct. 1780 . .	16
Communist Party v. Peek, 20 C 2d 536	10
Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541	15
First National Bank of Boston v. Belotti, 435, U.S. 765, 98 S.Ct. 1407	15, 16
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 .	16

Page(s)

Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303 . . . . . 12, 15

Moon v. Halverson 206, Minn. 331, 288 N.W. 579 17

Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 16

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621 . . 13

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 . . . . . 12, 13, 16

NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 . . . . . 12, 13, 15, 18, 19

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 . . . . . 8, 13

Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286 15

Redline Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S.Ct.1794 16

Page(s)

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243 16

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315 16

Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 96 S.Ct. 1817 16

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5 13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

v.

SAMUEL UNGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, in the case of Samuel Unger v. Marin County Democratic Central Committee, 1 Civil 47927 (Superior Court

No. 95238). The California Supreme Court denied a hearing in this case on May 22, 1980.

OPINIONS BELOW

The opinion of the California Court of Appeal and its modified opinion have not yet been printed.

JURISDICTION

The original opinion of the California Court of Appeal, First Appellate District, Division II, was filed February 27, 1980 and a copy thereof is appended to this petition (Appendix 1). On the motion of petitioner for rehearing the Court of Appeal filed a modification of opinion on March 28, 1980. A copy thereof is appended to this petition (Appendix 2). Petitioner's petition for hearing in the California

Supreme Court was filed April 7, 1980. By its order the Supreme Court, on April 24, 1980, extended its time to grant or deny a hearing in the case. The Supreme Court issued its order denying a hearing on May 22, 1980. A copy of this order is also appended to this petition (Appendix 3).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

In the action below SAMUEL UNGER brought suit seeking to prevent MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE from participating in a "non-partisan" school board election. Despite petitioner's objection, at every stage of the proceedings, that such relief would violate its rights of free speech and association guaranteed by the First and Fourteenth Amendments to the Constitution of

the United States, the California Court of Appeal held that the Central Committee in particular, and California political parties in general, were prohibited by Article II, Section 6 of the California Constitution from endorsing, supporting or opposing candidates in any election for a "nonpartisan" office.

The question is thus presented: Can a State Constitution providing for "nonpartisan" offices foreclose the exercise of petitioner's basic constitutional rights of free speech, assembly and political association? Or stated somewhat more generally, in the light of the First Amendment can partisan political activity be prohibited in local elections defined as nonpartisan?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved in this case are the First Amendment and the Fourteenth Amendment

to the Constitution of the United States, and Article II, Section 6 of the California Constitution (Deering's Constitution Annotated, Volume I, Supp., p. 131). Article II, Section 6 was formerly Section 5, adopted November 7, 1972; renumbered June 8, 1976.

STATEMENT

SAMUEL UNGER, petitioner below, filed a petition in Marin County Superior Court seeking an injunction and writ of mandamus directed to the MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE (county political committee), seeking to restrain it from endorsing, promoting, or financially supporting candidates for election to the Marin Community College District Governing Board. Insofar as is here relevant UNGER relied on California Constitution, Article II, Section 6, which in its entirety reads:

"Judicial, school, county, and city offices shall be non-partisan."

FACTS

The relevant facts are undisputed. UNGER was a duly qualified candidate for election to the governing board of the Marin Community College District at the November 6, 1979 election. MARIN DEMOCRATIC CENTRAL COMMITTEE invited all Democratic candidates to a meeting to seek the endorsement of the county committee and apply for financial assistance. UNGER did not attend. The committee did endorse four Democrats, publicly announced the endorsements, and planned to make financial contributions to the candidates endorsed. County committees in the San Francisco Bay Area have been openly endorsing and supporting candidates for nonpartisan offices for many years.

UNGER'S complaint set out most of the foregoing facts. A demurrer filed by the Central Committee, supported by a brief based in part on the protections of the First Amendment to the United States Constitution, was granted without leave to amend.

UNGER next filed a petition for writ of mandamus in the Court of Appeal for the State of California, First Appellate District, which was denied on October 10, 1979. UNGER then petitioned the Supreme Court of California which on October 31, 1979, granted a petition for hearing, transferred the case to the Supreme Court, and retransferred it to the Court of Appeal with directions to issue an alternative writ of mandamus to be heard before that court. Both in the Supreme Court and the Court of Appeal petitioner continued to urge its rights under the First Amendment to the Consti-

tution of the United States (not to mention its rights under the California Constitution). This material is found in the memo at Pages 4 - 6, with citations from federal cases and a quotation from The New York Times Company v. Sullivan, 376 U.S. 254, 84 S. Ct. 710.

Again, in the petition for rehearing filed by petitioner Central Committee, its entire argument (pp. 3 - 7) was that petitioner's rights to political association and free speech are protected both by the First and Fourteenth Amendments to the United States Constitution as well as by the California Constitution.

Finally, following the modification of the judgment by the Court of Appeal, in its petition to the California Supreme Court for appellate review, petitioner argued throughout (pp. 4 - 16) that First Amendment rights could not be abridged by the California

Constitution, citing many cases of this Court.

In its original decision the California Court of Appeal responded to petitioner's assertion of First Amendment rights very briefly:

> "Former Article II, section 2-1/2, in which the 'Truth In Endorsements Law' finds its genesis, expressly empowered the Legislature to regulate the manner in which political parties could participate in the direct primary election. (Cal. Democratic Council v. Arneberg (1965) 233 Cal. App. 2d 425.) Such regulation does not infringe the right of suffrage or violate the right of free speech. (Cal. Democratic Council v. Arnebergh, supra, at p. 432.)"

Following the Central Committee's petition for rehearing, the Court of Appeal revised its language to read as follows:

> "Former Article II, section 2-1/2, in which the 'Truth in Endorsements Law' finds its genesis, expressly empowered the Legislature to regulate the manner in which political parties could participate in the direct primary

> election. (Cal. Democratic Council v. Arnebergh (1965) 233 Cal. App. 2d 425.) Reasonable regulation pursuant to such a constitutional grant in order to prevent evils which formerly had been prevalent does not infringe on freedom of speech or association guaranteed by the Federal and State constitutions. (Cal. Democratic Council v. Arnebergh, supra, at p. 429: Petition for hrg. denied; Appeal dismissed for want of a substantial Federal question, 382 U.S. 202), nor does such regulation, even to the extent that it excludes parties and individuals participating in primary elections under certain conditions, restrict the constitutional right of suffrage. (Communist Party v. Peek (1942) 20 Cal. 2d 536, 544-545.) (Footnote omitted.)

As noted above, following the modification of opinion by the Court of Appeal petitioner filed a sixteen page brief with the Supreme Court requesting appellate review. The entire brief, except for a brief statement of facts, was an attempt to vindicate petitioner's rights under the First and Fourteenth

Amendments to the United States Constitution, but a hearing was denied.

REASONS FOR ALLOWING THE WRIT

Petitioner's basic and inalienable rights under the First Amendment to the United States Constitution have been partially destroyed by a California decision that petitioner, as a county central committee of a political party (and in fact political parties in general) may not endorse, support or oppose candidates in any election for "non-partisan offices". Petitioner contends that its rights under the First Amendment are protected against state action by the Fourteenth Amendment to the United States Constitution and that the California constitutional provision relied upon by the California Court of Appeal, as interpreted, is repugnant to the United States Constitution within the meaning

of 28 U.S.C. 1257(3).

Petitioner further contends that the California Court of Appeal has decided a federal question of substance not heretofore determined by the Supreme Court of the United States, and has decided the questions in a way which is not in accord with applicable decisions of this Court.

FIRST AMENDMENT RIGHTS ARE BASIC AND ESSENTIAL LIBERTIES AND ARE PROTECTED BY THE FOURTEENTH AMENDMENT AGAINST UNCONSTITUTIONAL STATE ACTION.

Abington School Dist. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163; Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303; NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328.

THE FIRST AMENDMENT TO THE

UNITED STATES CONSTITUTION PROTECTS FREEDOM OF ASSOCIATION FOR THE ADVANCEMENT OF POLITICAL BELIEFS.

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163; Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5; Buckley v. Valleo, 424 U.S. 1, 96 S.Cto 612; Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412; New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710; NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328.

MOREOVER, THESE CONSTITUTIONAL GUARANTEES HAVE THEIR FULLEST AND MOST URGENT APPLICATION PRECISELY IN THE CONDUCT OF CAMPAIGNS FOR POLITICAL OFFICE.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 62; Buckley v. Valleo, 424 U.S. 1, 96 S.Ct. 612. Ir Buckley this Court said:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the

> system of government established by our Constitution . . .
>
> In the free society ordained by our Constitution it is not the government but the people - individually as citizens and candidates and collectively as associations - who must retain control over the quantity and range of debate on public issues in a political campaign."

It follows that a decision that political parties may not support or oppose candidates for office is prima facie inconsistent with and violative of rights secured by the First and Fourteenth Amendments.

THE RIGHT TO ASSOCIATION WITH A POLITICAL PARTY OF ONE'S CHOICE IS AN INTEGRAL PART OF THE BASIC RIGHT OF POLITICAL ASSOCIATION PROTECTED BY THE FOURTEENTH AMENDMENT, AND ANY INTERFERENCE WITH THE FREEDOM OF A POLITICAL PARTY IS SIMULTANEOUSLY AN INTERFERENCE WITH ITS ADHERENTS.

Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541; Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303; NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328.

CONVERSELY, ORGANIZATIONS AS WELL AS INDIVIDUALS ARE ENTITLED TO EXERCISE FIRST AMENDMENT RIGHTS.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407; Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286.

MOREOEVER, IT IS UNCONSTITUTIONAL TO IMPOSE STRICTER FREE SPEECH STANDARDS ON PUBLIC OFFICIALS THAN ON THE GENERAL PUBLIC.

Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339.

STIFLING OF POLITICAL SPEECH AND OPINION IS ALSO A VIOLATION OF THE RIGHT OF THE GENERAL PUBLIC TO RECEIVE INFORMATION, WHICH IS PROTECTED BY THE FIRST AMENDMENT EQUALLY WITH THE RIGHT

TO SPEAK.

Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 96 S.Ct. 1818; Redline Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678; Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276.

. ONLY THE GRAVEST ABUSES, ENDANGERING PARAMOUNT INTERESTS, JUSTIFY ANY LIMITATION ON THE RIGHT OF FREE SPEECH AND ASSOCIATION. A SIGNIFICANT ENCROACHMENT UPON ASSOCIATIONAL FREEDOM CANNOT BE JUSTIFIED UPON A MERE SHOWING OF A LEGITIMATE STATE INTEREST.

Thomas v. Collins, 323 U.S. 516; First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407; Cohen v. State of California, 403 U.S. 15, 91 S.Ct. 1780; Buckley v. Valleo, 424 U.S. 1, 96 S.Ct. 612; NAACP v.

Alabama, 357 U.S. 449, 78 S.Ct. 1163

With regard to its prohibition against partisan speech, the California Court of Appeal said that reasonable regulation pursuant to a constitutional grant "in order to prevent evils which formerly had been prevalent" does not infringe on freedom of speech or association. But since the entire case was a matter of pleading only, with no evidence taken, the only indication of "evils" was the court's own reference to the case of Moon v. Halverson, 206 Minn. 331, 288 N.W. 579, where it is mentioned that the purpose of nonpartisan elections is to "lift judgeships above sordid political influence and to free the candidate from obligation to a party."

Laudable as such aims may be they cannot be secured by abridgment of First Amendment rights. This Court stated in Buckley v. Valleo, 424 U.S. 1, 96 S.Ct.

612, "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government establisned by our constitution." And it is submitted that for the court to assert that the party system is not an integral part of the elective machinery in a nonpartisan election is simply to beg the very question at issue. To justify regulations by the phrase such as "evils of partisanship" is insufficient. The state cannot foreclose exercise of constitutional rights by mere labels. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328.

No decision of this Court can be found concerning prohibition of free speech in "nonpartisan" elections. But see Abrams v. Reno, U.S.D.C., Florida, 452 F. Supp. 1166, involving a Florida statute prohibiting state and county political committees from endorsing or

supporting candidates of their own party in primary elections. The District Court pointed out that this Court has held several times that restrictions on advocacy of election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment, and held that the Florida statute was unconstitutional. In the case below the California Court of Appeal acknowledged Abrams v. Reno in a footnote but said it was not bound by the decision of a lower federal court.

EVEN CONSTITUTIONALLY PERMISSIBLE RESTRICTIONS ON THE EXERCISE OF FIRST AMENDMENT RIGHTS MUST BE DRAWN WITH NARROW SPECIFICITY.

NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900. There may be ways, such as prohibiting the use of party labels on the ballot, to prop-

erly carry out the intention of Article II, Section 6 of the California Constitution. But the prohibition set forth in the Court of Appeal's interpretation of the constitutional section is a pervasive encroachment on First Amendment rights.

Finally, the section itself is vague and ambiguous. The section provides for nonpartisan "offices" and does not mention elections. The California Court of Appeal says that this section is mandatory, prohibitory and self-executing, but there is no language of prohibition in this section and, petitioner submits, no language whatsoever on which the State Court can reasonably base its deprivation of fundamental.

CONCLUSION

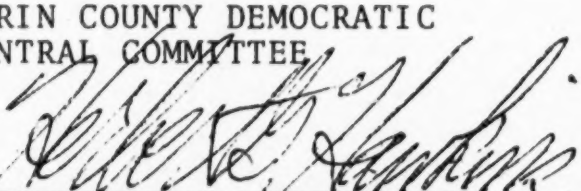
Since the California Supreme Court has refused to grant a hearing, this

Court is the court of last resort for all political parties and associations in the State of California, who need to have vindicated their rights of free speech and political association under the First Amendment to the Constitution of the United States. Petitioner submits that Article II, Section 6 of the California Constitution, as interpreted by the Court of Appeal of California, First Appellate District, is an intrusive and unjustified and unreasonable abridgment of First Amendment rights, and the interpretation should be held unconstitutional by this Court

Petitioner prays that a Writ of Certiorari issue.

Respectfully,

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE

By 

Herbert G. Hawkins
Attorney for Petitioner

CERTIFIED FOR PUBLICATION ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

F I L E D
Feb 27 1980
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
By _____ Deputy

SAMUEL UNGER,

Petitioner,

V.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF MARIN,

Respondent.

1 Civil 47927

Sup.Ct.No. 95238

MARIN COUNTY DEMOCRATIC COMMITTEE, also known as DEMOCRATIC CENTRAL COMMITTEE/MARIN, a county central committee,

Real Party in Interest.

In this extraordinary writ proceeding, we consider whether Article II,

(Appendix 1)

section 6 of the California Constitution prohibits a county central committee of a political party from endorsing, supporting or opposing a candidate for a school office.

Article II, section 6 of the California Constitution provides: "Judicial, school, county and city offices shall be nonpartisan."

The salient facts are undisputed. Petitioner Samuel Unger is a resident and registered voter of the County of Marin and was a duly qualified candidate on the ballot for election as member of the governing board of the Marin County Community College District at the November 6, 1979 election. On or about September 1, 1979, real party in interest Marin County Democratic Central Committee, a county central committee created pursuant to Elections Code section

8820, et seq., invited all registered Democrats who were candidates for the governing board of the district to attend a September 6, 1979 meeting of the county central committee to seek the endorsement of the county central committee for the office and to apply for financial assistance. Petitioner neither attended the meeting nor sought the endorsement or assistance of the county central committee. On September 6, 1979, the county central committee did in fact endorse four registered Democrats (out of 6 registered Democrats, 4 registered Republicans and 3 registered Independents) for the vacancies on the governing board to be filled at the November 6, 1979 election. The county central committee subsequently sent letters to unsuccessful applicants, publicly announced the endorsement of the four

candidates, and planned to make "small" financial contributions to the candidates it had endorsed.[1]

On September 12, 1979, petitioner filed a verified petition in respondent court seeking relief by mandate or by injunction to enjoin the county central committee from endorsing or supporting candidates for the nonpartisan office of member of the governing board of the district in the forthcoming November election and in all future elections for such nonpartisan office on the ground that the county central committee's

---

[1] Section 8500, et seq. of the Elections Code contains provisions governing the organization, operation and functions of that political party known as the Democratic Party of California. Similar provisions exist for the Republican Party of California (Section 9000, et seq.), the American Independent Party of California (section 9600, et seq.) and the Peace and Freedom Party of California (Section 9750, et seq.)

activities violated Article II, section 6 of the California Constitution and section 37 of the Elections Code.[2] Petitioner alleged that the conduct of the county central committee was causing great and irreparable injury to him in his capacity as resident, registered voter and candidate for the governing board of the district, an injury which was continuing and for which he had no plain, adequate or speedy remedy other than in the proceeding instituted by him.

On September 27, 1979, respondent court sustained a demurrer to the action without leave to amend and ordered that the action be

---

[2] Section 37 of the Elections Code provides: "'Nonpartisan office' means an office for which no party may nominate a candidate. Judicial, school, county and municipal offices are nonpartisan offices

dismissed.[3] Although the order of dismissal is a final judgment (Code Civ. Proc. Section 5813) which is appealable (Code Civ. Proc. Section 904.9), petitioner sought review by extraordinary writ, contending that appeal was not an adequate remedy in that he needed relief prior to the November 6, 1979 election. The issue of the absence of an adequate remedy in the ordinary course of law has been determined by the Supreme Court in its order directing the issuance of an alternative writ of mandate to be heard before this court. (Brown v. Superior Court (1971) 5 Cal.3d 509, 515.)

In its return to the alternative writ, real party does not deny that it had engaged in the conduct objected to by

---

[3] The demurrer was based on two grounds: (1) that the complaint did not state a cause of action, and (2) that the complaint was uncertain.

petitioner; real party contends that its conduct was in conformance with accepted practice it believed to be proper. Real party has submitted declarations attesting to the fact that the county central committees have been openly endorsing and supporting candidates for nonpartisan office for many years. The declarations show that the practice is widespread in the San Francisco Bay Area.[4]

---

[4] The declaration of Agar Jaicks, chairman of the Democratic Central Committee for the City and County of San Francisco avers that the San Francisco central committee has been endorsing and actively supporting candidates for the nonpartisan offices of mayor, board of supervisor, board of education, community college board and judge since 1967. The declaration of Sal Bianco, chairman of the Santa Clara County Democratic Central Committee avers that the Santa Clara County central committee has been endorsing candidates for nonpartisan offices since 1972. The declaration of Mary Warren, chairperson of the Alameda County Democratic Central Committee avers that over the past five years the Alameda County central committee has endorsed at least 100 candidates for the nonpartisan offices of supervisor, city council member, school board member and judge.

Before examining the provisions of Article II, section 6 of the Constitution (added to the Constitution as Section 5 in 1972 and renumbered Section 6 in 1976), we note that the Constitution furnishes a rule for its own construction. That rule, unchanged since its enactment in 1879, is that constitutional provisions are "mandatory and prohibitory, unless by express words they are declared to be otherwise." (Art. I, Section 26, Cal. Const.)[5] The rule applies to all sections of the Constitution alike and is binding upon all branches of the state government, including this court, in its construction of the provisions of Article II, section 6. (State Board of Education v. Levit (1959) 52 Cal.2d 441, 460-461.)

[5] Present section 26 of Article I appeared as section 22 thereof in the Constitution of 1879. It was repealed and re-adopted, as section 28 but otherwise unchanged, by vote of the people on November 5, 1970; on June 8, 1976 it was renumbered as section 26.

Section 26 of Article I "'not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited. Under the stress of this rule, it is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language,which cannot be misunderstood, and we must hold that they meant what they said .' . . . (Citation.)" (State Board of Education v. Levit, supra, at p. 460, emphasis added.)

Applying the foregoing rule of construction, the language of the constitutional provision is plain, explicit and free from ambiguity. "There is no necessity or opportunity to resort to jud-

icial construction to ascertain its meaning. When the facts in any particular case come within its provisions it is the duty of the court to apply and enforce it." (French v. Jordan (1946) 28 Cal.2d 765, 767.)

It cannot be denied that the office for which petitioner was a candidate was a "school" office within the meaning of the constitutional provision. "Nonpartisan" is defined as "not affiliated with or committed to the support of a particular political party: politically independent . . . viewing matters or policies without party bias . . . held or organized with all party designations or emblems absent from the ballot . . . composed, appointed, or elected without regard to the political party affiliations of members . . ." (Webster's New Int. Dictionary, 3d ed., 1965.)

In light of the foregoing, we hold that the explicit and unqualified language of Article II, section 6 prohibits a political party and, in particular, a county central committee of a political party, from endorsing, supporting, or opposing a candidate for the office of governing member of the board of a community college district, a nonpartisan school office within the meaning of the constitutional provision, in any election.[6]

Real party acknowledges that it is prohibited by the "Truth in Endorsements Law" (Elec. Code Section 11700, et seq.) from endorsing, supporting, or opposing any candidate for nomination for partisan

---

[6] Section 19 of the Elections Code provides that "'Election' means any election, including a primary which is provided for under the provisions of this code.

office in the direct primary election, but suggests that if the doctrine of expressio unius est exclusio alterius is applied, section 11702 constitutes the sole limitation upon its activities, and that it may participate in nonpartisan elections.[7]

We do not agree. Former Article II, section 2-1/2, in which the "Truth in Endorsements Law" finds its genesis, expressly empowered the Legislature to reg-

---

[7] Section 11702 of the Elections Code provides: "The state convention, state central committe, and the county central committee in each county are the official governing bodies of a party qualified to participate in the direct primary election." The state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." Any registered voter may apply to the superior court for a restraining order or injunction in the event of a violation of this chapter. (Elec. Code, Section 11706.)

ulate the manner in which political parties could participate in the direct primary election. (Cal. Democratic Council v. Arnebergh (1965) 233 Cal. App. 2d 425.)[8] Such regulation does not infringe the right of suffrage or violate the right of free speech. (Cal. Democratic Council v. Arnebergh, supra, at p. 432.) The provisions of Article II, section 6 of the Constitution, on the other hand, are self-executing; these provisions will be given effect without implementing legislation. (Chesney v.

---

[8] In 1963, at the time the "Truth in Endorsements Law" was enacted, former Article II, section 2-1/2 provided that "(t)he legislature shall have the power . . . to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any . . . primary election." Former Article II, section 2-1/2 was repealed November 7, 1972, and superseded by Article II, section 5 which provides in relevant part, "the Legislature shall provide for primary elections for partisan offices."

Byram (1950) 15 Cal. 2d 460, 4603; Taylor v. Madigan (1975) 53 Cal.App.3d 943, 950-952.)[9] Although the legislature may enact legislation to implement a self-executing provision of the Constitution (Chesney v. Byram, supra, at p. 463, "'(i)t is not and will not be questioned but that . . . it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail or abridge this constitutional grant.' (Citations.)" (Flood v. Riggs (1978) 80 Cal.App.3d 138, 154.)

Legislative inaction can in no manner qualify constitutional provisions capable of self-execution whose language ade-

---

[9] A constitutional provision may be said to be self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." (Chesney v. Byram, supra, at p. 462; Taylor v. Madigan, supra, at p. 950, fn. 3.)

quately sets forth the rule through which the duty imposed may be enforced. (Flood v. Riggs, supra, at p. 155.) Moreover, the constitutional grant constitutes a restraint upon the law-making powers of the state, and legislative enactments contrary to its provisions are void. (Sail'er Inn., Inc. v. Kirby (1975) 5 Cal.3d 1, 8.)

We also disapprove the opinion of the Attorney General relied upon by real party (59 Ops. Atty. Gen. 60 issued on January 2, 1976) to the extent that it is inconsistent with the constitutional mandate herein expressed. Although opinions of the attorney general, who is charged with the duty to enforce the law, are entitled to great weight, the opinions of the attorney general are not controlling as to the meaning of a constitutional provision or statute. (Smith v.

Municipal Court (1959) 167 Cal.App.2d 534, 539.)

Because this case poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state, we have undertaken to resolve the issue raised by petitioner even though an event occurring during its pendencey would normally render the matter moot. (Zeilenga v. Nelson (1971) 4 Cal.3d 716, 719-720.) Although we have concluded that petitioner's complaint stated a proper cause against the demurrer, it is obvious that by reason of the election of November 6, 1979 having taken place, this court cannot grant the relief sought by petitioner (Kagan v. Kearney (1978) 85 Cal.App.3d 1010, 1014; Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 372), and we deem it unlikely that real party,

having been apprised of this decision, will repeat the conduct which precipitated this proceeding.

The alternative writ, having served its purpose, is discharged, and the peremptory writ is denied. All other relief sought by petitioner is denied.

CERTIFIED FOR PUBLICATION.

Miller, J.

WE CONCUR:

Taylor, P.J.

Rouse, J.

CERTIFIED FOR PUBLICATION COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SAMUEL UNGER, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF MARIN, Respondent.	1 Civil 47927 Sup.Ct.No. 95238 MODIFICATION OF OPINION
MARIN COUNTY DEMOCRATIC COMMITTEE, also known as DEMOCRATIC CENTRAL COMMITTEE/MARIN, a county central committee Real Party in Interest	

BY THE COURT:

The opinion filed on February 27, 1980 is modified as follows:

On page 2, footnote designation 1,

(Appendix 2)

appearing after the word "endorsed", which is the last word in the body, has been moved to appear after the word "assistance", on line 12.

On page 8, lines 6 through 9 are deleted and in their place is inserted the following:

Reasonable regulation pursuant to such a constitutional grant in order to prevent evils which formerly had been prevalent does not infringe on freedom of speech or association guaranteed by the federal and state Constitutions (Cal. Democratic Council v. Arnebergh, supra, at p. 429; petition for hrg. denied; appeal dismissed for want of a substantial federal question, 382 U.S. 202), nor does such regulation, even to the extent that it excludes parties and individuals from participating in primary elections under certain conditions, restrict the con-

stitutional right of suffrage. (Communist Party v. Peek (1942) 20 Cal.2d 536, 544-545.)[9]

In nonpartisan election, "the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization". (Communist Pary v. Peek, supra, at p. 544.) The evils of partisanship in certain offices are well illustrated in Moon v. Halverson (1939) 206 Minn. 331, 288 N. W. 579, 581-582 (concurring opinion of Loring, J.). No constitutional provision

---

[9] Real party has acknowledged that it is bound by section 11702 of the Elections Code (infra, at p. ___, fn. 7), which is not here under attack (see People v. Crutcher (1968) 262 Cal.App.2d 750, 752-753, but see Abrams v. Reno (1978) 452 Fed. Supp. 1166, a decision of a lower federal court by which this court is not bound (People v. Bradley (1969) 1 Cal.3d 80, 86)).

was at issue in Moon; here by constitutional command, the People have directed that certain offices shall be nonpartisan. The provisions of Article II, section 6, unlike the provisions of former Article II, section 2-1/2 are self-

On page 8, existing footnote 9 is renumbered footnote 10.

The petition for rehearing is denied.

Dated: Mar 28 1980

CERTIFIED FOR PUBLICATION

Taylor, P.J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 22 1980

I have this day filed Order

HEARING DENIED

In re: 1 Civ. *No.* 47927

Unger

vs.

Marin County Democratic Central Committee

Respectfully,

G. E. BISHEL
Clerk

65953-877 11-78 4M OSP

(Appendix 3)

No. 80-384

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

-vs.-

SAMUEL UNGER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LYNN S. CARMAN
P. O. Box 3693
San Rafael, CA 94912
Telephone: (415) 461-1392

Attorney for Respondent

TABLE OF CONTENTS

Page

Brief in Opposition to Petition for Writ of Certiorari 1

Constitutional History, and Facts 3

Points and Authorities 6

I. Absent any poll or caucus of party members, CENTRAL COMMITTEE is not authorized to speak or act on the subject of party endorsements, hence no First Amendment rights are violated. 6

II. California has a compelling state interest, and a Tenth Amendment right, to prohibit state-aided Partisan Party participation in nonpartisan elections. Such prohibition does not infringe upon acts or speech integral to the right to vote or the elective process. Neither the First Amendment nor equal protection is violated. 12

TABLE OF CONTENTS (Cont.) Page

III. California has the right to require that substantially state-aided Partisan Parties not use such extra, state-derived political power in nonpartisan elections. 17

IV. Comment on Florida cases cited by petitioner. 21

Summary 22

Prayer 26

TABLE OF AUTHORITIES

Page

Cases

Abrams v. Reno (1978 D.C.S.D.Fla.) 452 F.Supp. 1166 — 22

Buckley v. Valeo (1976) 424 U.S. 1, 46 L.ed.2d 659, 96 S.Ct. 612 — 13

Communist Party v. Peek (1942) 20 Cal.2d 536, 544 — 14

Concerned Democrats v. Reno (1978 D.C.S.D.Fla.) 458 F.Supp. 60 — 21

First Bank of Boston v. Bellotti (1978)435 U.S. 765, 98 S.Ct. 1407, 55 L.ed.2d 707 — 12

Katz v. Fitzgerald (1907) 152 Cal. 433 — 18,20

McClintock v. Abel (1937) 21 Cal. Cal.App.2d 11 — 4

Morial v. Judiciary Comm. of La. (1977 5th Cir.) 565 Fed.2d 295 — 16

People v. Crutcher (1968) 262 Cal.App.2d 750 — 10

Socialist Party v. Uhl (1909) 155 Cal. 776 — 21

State v. Anderson (Wisc) 76 N.W. 482 — 17

U.S. Civil Service Comm. v. Natl. Assn. of Letter Carriers (1973) 413 U.S. 548, 93 S.Ct. 2880, 37 L.ed.2d 796 — 16

TABLE OF AUTHORITIES (Cont.) Page

Authorities

25 Am.Jur.2d, Elections, §145 10

23 Opinions Attorney General 119 (Cal.) 7 - 10

55 State Bar Journal 414 (Oct 1980), (Cal.) 15

Constitutions

United States Constitution, 1st Amend. 2,11

10th Amend.12

California Constitution,
Article II, (former) Sec. 2 1/2 3
Article II, (former) Sec. 2 3/4 4
Article II, Sec. 6 2, 4-5

Statutes

Direct Primary Law of 1913 3

California Elections Code,
Sections 6400, 8870, 9370, 9720, 9760, 10210 19

Section 6430 25

No. 80-384

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE,

Petitioner,

-vs.-

SAMUEL UNGER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent SAMUEL UNGER prays that hearing be granted, and that upon hearing, that the Court find that no First Amendment rights of petitioner MARIN COUNTY DEMOCRATIC CENTRAL COMMITTEE, ("CENTRAL COMMITTEE"), have been violated, and affirm the Unger decision, (1 Civil 47927).

Hearing should be granted because, although First Amendment issues were elaborately briefed and argued by both UNGER and CENTRAL COMMITTEE below, nevertheless the Court of Appeal opinion did not articulate the First Amendment issues. (The opinion devotes all of two sentences and one footnote to First Amendment issues.) The result is at least four pending state actions litigating as to whether or not Unger decided the First Amendment issues, (it did); and as to what political organizations Article II, Section 6, California Constitution applies, (it applies at least to all partisan parties qualified for and receiving substantial state aid, (hereinafter called "Partisan Parties")). Further, the Court of Appeal opinion omits a compelling reason why no First Amendment rights of CENTRAL COMMITTEE were violated, namely: the

CENTRAL COMMITTEE is the mere agent of party members, and is not the party; such that in the absence of any poll or caucus of party members, the CENTRAL COMMITTEE is totally unauthorized, and acts ultra vires, in "officially" selecting any party candidate for any office; and its "official" endorsements are a false representation to the electorate, (therein damaging to other candidates), that the endorsees are the official candidates of the Democratic Party.

CONSTITUTIONAL HISTORY, AND FACTS

The California Direct Primary Law of 1913, enacted under authority of former Article II, Section 2 1/2, California Constitution, provided for nomination of candidates for both partisan and nonpartisan offices by direct vote. Its pith was that party executive committees were prohibited from selecting candidates

for any election, partisan or nonpartisan, this selection being placed entirely in the hands of party members, (in the case of partisan offices), and in the hands of the entire electorate, (in the case of nonpartisan offices). (The general or runoff election followed the primary election of partisan and nonpartisan candidates, respectively.) This system has continued to this day, (with modifications not germane to case at bar). (See McClintock v. Abel (1937) 21 Cal.App.2d 11). A corollary of this system is that state-aided Partisan Parties are the only parties permitted to participate in the partisan elections for state and federal office, but are absolutely barred from participation in the municipal, school and judicial nonpartisan elections.

In 1926, former Section 2 3/4 of Article II was added to further specifically provide for nonpartisan elections. In 1972, Article II, Section 6 replaced former

Section 2 3/4, providing:

"Judicial, school, county, and city offices shall be nonpartisan."[1/]

(Note, that the 1972 initiative ballot argument stated only: "Judicial, school, county, and city offices would be continued as nonpartisan offices." (Emphasis supplied).

By reason of this constitutional history, there has been nearly a century of no selection of candidates by Partisan Parties in nonpartisan elections. In the last decade, however, Democratic Party central committees in the San Francisco Bay Area have been seizing power to the central committees by endorsing, aiding and funding selected Democrats as official party candidates in nonpartisan elections, -- without any poll or caucus of party members, to boot. (See affidavits

---

(1) Originally Article II, Section 5, added November 7, 1972 by initiative, renumbered June 8, 1976.

of party chairmen referred to in Court of Appeal opinion.) Case at bar arises from this background.

Thus, for the November 6, 1979 election to four seats on the Marin Community College District governing board, (lying entirely within Marin County), there were 13 candidates, -- six Democrats, four Republicans, and three independents, (including UNGER). In September 1979, without any poll, caucus or by-your-leave of party members, the CENTRAL COMMITTEE unauthorizedly selected four Democrats as party candidates, publicized the endorsements, and planned to contribute party funds to these candidates. Three of the four endorsees won election.

POINTS AND AUTHORITIES

I. The law of agency, acceded to by state party history, demonstrates that county central committees do not have authority, in any event, to select party candidates,

(this function being reserved, if at all, to party members acting in polls or caucuses). Absent any poll or caucus of party members, CENTRAL COMMITTEE is not authorized to speak or act on the subject, hence no First Amendment rights are violated.

In a masterful historical summary of agency law and California central committee authority, 23 Opinions Attorney General 119 (1954 Cal.Atty.Gen.), concluded:

(1) That neither by agency law, legislative history, or party custom can central committees select party candidates, and,

(2) The function of selecting party candidates is reserved to and is performable only by party members at a caucus or poll.

23 Opinions Attorney General notes at 121-123:

" . . . (I)n the convention era the central committee's basic function was to accept and campaign for the convention's nominees. Party usage apparantly did not permit the committee to anticipate the convention's choice by presenting it with an "official" pre-convention slate or use party funds to push one of several pre-convention aspirants. It would be naive to suppose that the central committees of those days meticulously refrained from attempts to steer the conventions. What such a committee might do as a group of individuals or an unofficial caucus is one thing. What it might do as a representative party organ, taking official action at an official meeting, is another. Such limitations

as existed applied to the committee solely in its official, representative character."

Construing former Section 2832 Calif. Elections Code, (now Section 8942 Elections Code), (heavily relied upon by CENTRAL COMMITTEE), -- providing that county central committees:

" . . . shall perform such other duties and services for their respective parties as seem to be for the benefit of the party.",

the opinion concluded that this subsequen statute did not change the agency rule:

"Where, however, several candidates of the same party are contending for the party's primary election nomination, then the committee's endorsement is not for the benefit of the party. Instead, it is aimed at benefiting an individual or group within the

party." 23 Opinions Attorney General at 123.

(We note that 23 Opinions Attorney General 119 is, by parity of reasoning, applicable with force to the nonpartisan election situation at bar.)

People v. Crutcher (1968) 262 Cal.App.2d 750, 752:

> "The influence of the official political body may not be used for or against any party member."

All this is in accord with black letter law, set forth in 25 Am.Jur.2d, Elections, §145:

> " . . . (I)n some jurisdictions nominations for particular offices,ordinarily local in nature, are permitted by statute or by party custom or usage to be made by party caucus or unofficial primary. A caucus is simply a gathering of the members of

> <u>one political party</u> for the purpose of selecting . . . persons who, in the opinion of the majority of those composing such caucus, it would be desireable to elect. . . . To be valid, a party caucus must be duly called and noticed by the proper authority . . . ", (citing many cases). (Emphasis supplied).

The caucus or poll of party members is the breath of democracy and the means and the justification, if any, for authorizing party members to exercise their right of suffrage through political parties. The First Amendment does not prohibit restraint on unauthorized speech, (i.e., unauthorized endorsements), nor on false representations to the electorate that certain candidates are the official Democratic Party candidates, (when in fact no selection process by party members has occurred).

II

California has a compelling state interest, subsumed under the 10th Amendment, to preserve nonparty impartiality, -- and the appearance thereof, -- in the acts of judicial, school, county and city officers, by the narrowly drawn means of prohibiting only state-aided Partisan Parties from nonpartisan elections. Such prohibition does not infringe upon acts or speech integral to the right to vote or the elective process. Further, the classification is reasonable, hence equal protection is not violated.

It is one thing to say that a corporate entity has an interest and right in effectively speaking and associating with other non-state-aided entities and individuals. First Bank of Boston v. Bellotti (1978) 435 U.S. 765, 98 S.Ct. 1407, 1421, 55 L.ed.2d 707. It is quite another thing to say that corporate

entities and individuals have a right to use substantial state aid in their combination so as, thereby, to dominate, tend to dominate, or appear to dominate either or both (1) the result of municipal and judicial elections, and (2) official acts of officers so elected, when such state-aided combinations are neither a necessary or integral part of the elective machinery for those offices. This is especially true when the offices involved are judicial, academic, and administrative.

We concede, and agree with Buckley v. Valeo (1976) 424 U.S. 1, 46 L.ed.2d 659, 96 S.Ct. 612, that state-aided Partisan Parties are truly necessary and an integral part of the elective process in statewide and national elections. How else is a candidate for governor or federal office to campaign, and how are the statewide voters to learn about the

candidate and his views if not by a Partisan Party process which selects the candidate in the first place, and then puts its organization, funding and publicity behind him.

It is quite a different scenario in local and judicial elections, however; and there we part company with Buckley. There, in nonpartisan local and judicial elections,

> " . . . the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization". Communist Party v. Peek (1942) 20 Cal.2d 536, 544.

In such elections, without a party, a nonpartisan candidate in California can easily place himself on the ballot with

a self-obtained nominating petition; he can "walk the precincts" in all or most of the significant precincts involved; and the voters are few enough or so geographically close together that he can raise sufficient funds by which to reach them, -- all without Partisan Party backing.[1/] Hence, Peek was correct in its holding. Also, the state's electorate impliedly so found in adopting Article II, Section 6, California Constitution as an initiative. Further, CENTRAL COMMITTEE has utterly failed in even attempting to show factually that the implied findings of the Direct Primary Law of 1913, and of Article II, Section 6, were not or are not true today.

---

(1) We contend this is applicable to the offices of Court of Appeal and Supreme Court justices. They are initially appointed, and campaign statewide only on a "Yes" or "No" issue of retention in office. See recent developments, 55 Calif.State Bar Journal 414 (Oct 1980). None has ever required party aid to be reelected.

Further, Morial v. Judiciary Comm. of State of La. (1977 5th Cir.) 565 Fed.2d 295, and U.S. Civil Service Comm. v. Natl. Assn. of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.ed.2d 796 (1973) appear to hold that governments have a compelling interest, "entitled to the greatest respect", in ensuring both the impartiality and the appearance of impartiality in the judicial and bureaucratic administration of the laws, -- particularly where the prohibition does not burden either the individual's right to vote nor the free statement of the individual's views in a non-official capacity. (There is nothing to prevent CENTRAL COMMITTEE members, -- without identifying themselves as such, -- from renting the biggest billboard in Marin County and endorsing, as individuals, any candidate for non-partisan office.)

Morial and Letter Carriers but restate

the received American wisdom on this point:

> " . . . mere party fealty and party sentiment, which influences men to desire to be known as members of a particular organization, are not the subjects of constitutional care," so long as "the right of the individual to vote for the candidate of his choice is not interfered with . . . " State v. Anderson (Wisc.) 76 N.W.48?

III

The Democratic Party and other Partisan Parties receive substantial state aid which gives them extra political power. California had to furnish such state aid, willy-nilly in the first place, to regulate corrupt practices of Partisan Parties. California has the right to condition such substantial state aid on the requirement that state-aided Partisan Parties not use this extra, state-derived political power in nonpartisan elections.

The California Democratic Party has been swimming so long in the ocean of state aid that it is no longer aware that it is the recipient of substantial state aid which gives it extra clout. At the turn of this century, the state took over, at its expense, the performance of important Partisan Party functions, because:

> " . . . the evils sought to be remedied by the adoption of section 2 1/2 of article II of our constitution were the corrupt practices by which, in the absence of proper public control, primary elections were made to defeat instead of to express the will of political parties." Katz v. Fitzgerald (1907) 152 Cal. 433, 434.

Thus, the Democratic Party and the other four Partisan Parties which have registered members equalling 1% of the votes cast at the last gubernatorial

election, qualify for and receive the following state aid:

(1) County clerks register party members by Partisan Party affiliation, keeping membership lists current and available to the Partisan Parties;

(2) The state conducts central committee elections of Partisan Parties, (Sections 8870, 9370, 9720, 9760, Calif. Elections Code);

(3) The state conducts Partisan Party nominating polls, called primary elections, for state and federal party candidates, (Section 6400, Calif. Elections Code); and,

(4) The Partisan Party nominee automatically goes upon the general election ballot, under the party label, (Section 10210, Calif.Elections Code).

Performance of these expensive and important logistical party matters by the state also prevents intercine

warfare between party factions. Such substantial state aid clearly gives qualified Partisan Parties such as the Democratic Party enormous superiority in party organization, continuity, and legitimacy, in comparison with all other non-qualified organizations, to the degree that it is more than reasonable, -- indeed, necessary, -- for the state to impose the condition upon Partisan Parties that they not use this extra, state-derived power in nonpartisan elections.

(In this view of the matter it appears that California either considers non-state-aided organizations as not being recognizable political parties,[1] and

---

(1) " . . . there is no constitutional recognition of any body of men calling themselves a party until three percent of the vote has been cast by such body." Katz v. Fitzgerald (1907) 152 Cal. 433, 436.

hence not within the scope of Article II, Section 6, (the view we take); or else, if California does consider non-state-aided organizations to be political parties,[1] that they are nevertheless such minnows that they pose no threat to nonpartisan office impartiality on a statewide basis, and are not includible within the intent of Article II, Section 6 on that account. Under either view of non-state-aided organizations, no equal protection issue is apparant, inasmuch as the different treatment afforded state-aided Partisan Parties has a rational basis.

IV

Comment on Florida cases cited by petitioner.

Concerned Democrats v. Reno (1978 D.C.S.D.Fla.) 458 F.Supp. 60, agrees with

(1) "A political party is an organization of electors believing in certain principles concerning governmental affairs and urging the adoption and execution of these principles through the election of their respective candidates at the polls." Socialist Party v. Uhl (1909) 155 Cal. 776,793.

the Unger decision in holding that a statute, (Fla.Statute, §105.071(7)), which in effect prohibits contributions by parties to nonpartisan candidates, does not violate the First Amendment. (The rest of Concerned Democrats is a nonsequitur.)

Abrams v. Reno (1978 D.C.S.D.Fla.) 452 F.Supp. 1166, inexcusably fails to recognize or be aware of the agency principle which prohibits a mere agent of a party from supporting or opposing any candidate for party endorsement, prior to a caucus or poll by party members on that very subject.

SUMMARY

For nearly a century, the people of the State of California, exercising their 10th Amendment right, through their own right of initiative in their own state constitution, have effectively maintained, against the world,

-- a viable system of nonpartisan election of judicial, academic, administrative and local officers, and

-- a prohibition against selection of Partisan Party candidates, if at all, by unrepresentative, undemocratic fiat of executive committees.

These requirements do not interfere with any CENTRAL COMMITTEE member's right to vote, nor do they prohibit or limit in any manner the right of individual CENTRAL COMMITTEE members, acting individually, to speak and aid any candidate, or to associate with individuals or non-Partisan Party groups in speaking for or aiding any candidate in nonpartisan elections. Unlike the Buckley v. Valeo situation, (to wit, elections for federal office), state-aided Partisan Party participation in nonpartisan elections in California has never been necessary

either to educate the electorate about the nonpartisan candidate and his views, or to enable the nonpartisan candidate to effectively campaign. (The people in enacting Article II, Section 6 as recently as 1972 have so found; and CENTRAL COMMITTEE adduces no facts to the contrary.) Hence, state-aided Partisan Party participation in nonpartisan elections is not and never has been an integral part of the state's nonpartisan elective machinery.

Thus, even if California had no compelling interest in the matter, its exercise of its sheer 10th Amendment right to select its own nonpartisan political system, free from interference of the federal government, does not, in the facts at bar, violate the Bill of Rights. In addition, however, California has a compelling state

interest in ensuring nonparty impartiality, and the appearance of impartiality, in the acts of its municipal, academic, administrative and judicial officers. Given this compelling state interest and the mix of facts in case at bar, the Bill of Rights is implemented by Article II, Section 6, not violated.

Lastly, there is no equal protection violation involved. By legislative history, Article II, Section 6 and its predecessors applies only to state-aided Partisan Parties, i.e., organizations having registered members equalling 1% of the votes cast at the last gubernatorial election, or which had a statewide candidate in the last gubernatorial election receiving 2% of the votes cast. (Section 6430 Calif. Elections Code). Such classification is reasonable, in view of the fact that organizations having fewer than 1% of the registered voters of the

state clearly pose no threat to preserving nonparty impartiality in the acts of judicial, school and municipal officers, whereas Partisan Parties receiving state aid, (such as the Democratic Party having approximately 50% of the registered voters), do pose such a threat. (Such implied findings of Article II, Section 6 and its predecessors are not rebutted by any evidence adduced by CENTRAL COMMITTEE.)

WHEREFORE, respondent prays that this Court grant a hearing, and after hearing, find and determine that no First Amendment rights of CENTRAL COMMITTEE are violated by Article II, Section 6, California Constitution, for the reasons stated in this brief; and that respondent have his costs and such other and further relief as the Court may deem proper.

Respectfully submitted,

LYNN S. CARMAN
Attorney for Respondent